United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 12,673

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., APPELLEES.

No. 12,674

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., APPELLEES.

No. 12,675

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, A CORPORATION, ET AL., APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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[fol. A] Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the September Term, 1943, of said Court, before the Honorable John B. Sanborn and the Honorable Walter G. Riddick, Circuit Judges, and the Honorable Harry J. Lemley, District Judge.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the 31st day of July, A. D. 1943, transcripts of records pursuant to appeals taken from the District Court of the United States for the Western District of Missouri, were filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, Inc., et al., were Appellees, wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, Inc., et al., were Appellees, and wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, a Corporation, et al., were Appellees, which said transcripts as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, are in the words and figures following, to-wit:

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,873
CIVIL.

UNITED STATES OF AMERICA, APPELLANT,
vs.
BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., AND W. L. MELLOR AND DAHDE W. WINEBRENNER (ALIAS MURRAY BAILEY) AND CORNELIUS G. LOOSE AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1913.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 12,673

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., AND W. L. MELLOR AND DAHNE W. WILBRENNER (ALIAS MURRAY BAILEY) AND CORNELIUS G. LOOSE AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1943.

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[fol. 1] United States of America, Set.:

Be it remembered that heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 13th day of February, 1943, there was filed in the office of the clerk of said court a Petition in the cause wherein United States of America, at the relation of and to the use of Lou Nathanson is Plaintiff and Baker-Lockwood Manufacturing Co. Inc. and W. L. Mellor and Dahme W. Winebrenner (alias Murray Bailey) and Cornelius G. Loose and Ben D. Christian are Defendants.

Said Petition is as follows:

(Petition.)

In the District Court of the United States of America for the Western District of Missouri, Western Division.

United States of America, at the relation of and to the use of Lou Nathanson, Plaintiff,

No. 1407 vs.

Baker-Lockwood Manufacturing Co. Inc. and W. L. Mellor and Dahme W. Winebrenner (alias Murray Bailey) and Cornelius G. Loose and Ben D. Christian, Defendants.

Plaintiff says that Lou Nathanson is and was at all times prior to and at this date a citizen of the state of Illinois and resides in Cook County in said state.

The plaintiff complaining of the above named defendants in a cause of action to recover double the amount of damages together with the costs of suit and other penalties accruing under and pursuant to section 3490 of the Revised Statutes of the United States Code alleges as follows:

That defendant, Baker-Lockwood Manufacturing Co. incorporated, was a corporation of Missouri in the can-

vas manufacturing business at 14th and Clay St. North Kansas City, Missouri and that W. L. Mellor was president and that Dahme W. Winebrenner was general sales manager.

That Ben D. Christian was president of Safway Steel Products Co. of Milwaukee.

That Cornelius G. Loose was successively administrat-[fol. 2] ing officer, senior administrating officer; principal administrating officer Contract Section General Procurement Branch of the Material Center U. S. Army Air Forces, Wright Field, Dayton, Ohio.

That beginning February 1, 1941 up to the present, in the Kansas City in the Western District of Missouri, in Dayton, Wright Field and London Ohio in Dallas, Texas in Milwaukee, Wisc., the aforesaid defendants agreed to and did defraud the United States of money, property rights and of its right to unbiased services of the defendant, Cornelius G. Loose as principal administrating officer, free from corruption and misrepresentation trickery or fraud in more than $7,000,000.00. to be paid for the manufacture of aircraft field maintenance shelters and was awarded at excessive prices to the damage of the United States in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

That Cornelius G. Loose would accept money from defendants and others under the guise of winning in games of chance and that Cornelius G. Loose would take action in the award of contracts contrary to the best interests of the United States and without merit of bids or offers and would agree to submit excessive bids for the construction of shelters and towers and as part of the conspiracy, Cornelius G. Loose would accept these excessive bids and only the said Baker-Lockwood Manufacturing Co. would be allowed to participate in bids for canvas coverings.

That Ben D. Christian would conceal such transactions and acts to prevent disclosure of the evidence and would destroy and alter books, records and documents in furtherance of said conspiracy arranged by the defendant conspirators. That Dahme W. Winebrenner as part of the con-

spiracy would hold himself out as able to influence Cornelius G. Loose and did so.

That W. L. Mellor and the Baker-Lockwood Manufacturing Co. provided Dahme W. Winebrenner alias Murray Bailey with large sums of money to influence Cornelius G. Loose and favor the said company defendant.

Wherefore, the United States of America, at the relation of and to the use of Lou Nathanson, prays judgment against the defendant for $2,000,000.00 Two Million Dollars., together with interest and costs.

Feb. 13, 1943.

[fol. 3] LOU NATHANSON,
1 N. LaSalle St., Chicago.

First Amended Complaint.

In the District Court of the United States for the Western Division of the Western District of Missouri.

United States of America at the relation of and to the use of Lou Nathanson, Plaintiff,

No. 1407 vs. Civil Action.

Baker-Lockwood Manufacturing Company, Inc. a corporation, W. L. Mellor, Dahme W. Winebrenner (alias Murray Bailey), Cornelius G. Loose, Ben D. Christian and Safway Steel Products, Inc., a corporation, Defendants.

Plaintiff files this first amended complaint before a responsive pleading has been served or filed by any defendant herein, and for cause of action states:

1. Plaintiff Lou Nathanson states that at all times herein mentioned he is and was a resident of Cook County, Illinois, and files and prosecutes this civil action in behalf of the United States of America and himself under Sections 5438 and 3490-3493 (31 U.S.C.A. Secs. 231-234) of the Revised Statutes of the United States, and that this court has jurisdiction thereunder and under Section 3491 of said Revised Statutes (31 U.S.C.A. Sec. 232).

2. That defendant Baker-Lockwood Manufacturing Company, Inc. is a corporation duly organized and exist-

ing according to the laws of Missouri, having its chief office and place of business in Clay County, Missouri.

3. That defendant W. L. Mellor as President of Baker-Lockwood Manufacturing Company, Inc., and is a resident of the Western Division of the Western District of Missouri.

4. That defendant Dahne W. Winebrenner (alias Murray Bailey) was Sales Manager of Baker-Lockwood Manufacturing Company, Inc., and is a resident of Galloway, Ohio.

5. That defendant Cornelius G. Loose was Principal [fol. 4] Administrative Officer, General Procurement Branch, Contract Section, Material Center of the Army Air Force, Wright Field, Dayton, Ohio, and is a resident of Dayton, Ohio.

6. That defendant Ben D. Christian is a resident of Milwaukee, Wisconsin, and defendant Safway Steel Products, Inc., is a corporation duly organized and existing according to law, and has its office and chief place of business in Milwaukee, Wisconsin.

7. None of the defendants are in the military or naval forces of the United States of America or in the militia called into or actually employed in the service of the United States.

8. That the defendants named herein, together with other persons and corporations, the true names of which are unknown to plaintiff, prior to February 1st, 1943, agreed, confederated, combined and conspired with each other and with other persons and corporations, whose names are unknown, to cause to be presented for payment to the United States claims upon or against the Government of the United States, knowing such claims to be fraudulent, and pursuant to such conspiracy, did make or cause to be made, and did present or cause to be presented for payment or approval to or by persons or officers in the civil, military or naval service of the United States, claims upon or against the Government of the United States, knowing such claims to be false, fictitious and fraudulent, and pursuant thereto, for the purpose of obtaining or aiding to obtain the payment or approval of such claims,

made, used or caused to be made or used false bills, receipts, vouchers, rolls, accounts, claims, certificates and affidavits, knowing the same to contain fraudulent or fictitious statements and entries.

9. That defendants and each of them entered into an agreement, combination, confederation or conspiracy with each other to defraud the Government of the United States by obtaining or aiding to obtain the payment or allowance of false and fraudulent claims against the United States, with the intent to defraud the United States, and with the intent to wilfully conceal the money or other property so obtained.

10. That the defendants and each of them thereby jointly and severally became liable to forfeit and pay to the United States the sum of Two Thousand ($2,000.00) Dollars for each of the acts and transactions herein men-[fol. 5] tioned, and in addition thereto, are liable for double the amount of the damages sustained by the United States by reason of the doing or committing of said acts.

11. That in pursuance of the agreement, confederation and conspiracy aforesaid, the defendants did procure or cause to be procured certain contracts with the United States War Department numbered Contract W 535 ac 22830 between the United States War Department and Universal Steel Products Company, Contract W 535 ac 28404 between the United States War Department and Baker-Lockwood Manufacturing Company, Inc., Contract W 535 ac 31260 between the United States War Department and Safway Steel Products Company, Inc., and Contract W 535 ac 32112 between the United States War Department and Safway Steel Products Company, Inc. together with other contracts between departments and agencies of the United States Government and other persons or corporations, all of which contracts were obtained, procured, negotiated and executed fraudulently and pursuant to corrupt arrangements made with the Defendant Loose in the abuse by him of his official duties, and at exorbitant and excessive prices.

12. That said contracts and all of them were so procured by intentionally discouraging and precluding competing firms from openly and fairly competing and bid-

ding thereon and by preparing and fraudulently arranging to prepare specifications in such a manner as to favor the parties contracting with the United States and to render bidding by competing firms difficult and by intimidating other bidders; that the acts and conduct of the defendants in the premises were corrupt and illegal and were engaged in by defendants and others, whose names are unknown to plaintiff, for the ultimate purpose of charging the United States of America excessive sums and causing to be presented to the United States of America for payment claims upon or against the Government of the United States, knowing such claims to be fraudulent.

13. That the defendants and each of them knew that the various claims made against the United States pursuant to the confederation and conspiracy between the defendants were in excess of sums for which the contracting parties were legally entitled to collect or obtain, and the United States had been damaged by the payment of false, fraudulent and fictitious claims in a sum the exact [fol. 6] amount of which is unknown, but which, upon information and belief, plaintiff charges was and is in excess of Seven Hundred Fifty Thousand ($750,000.00) Dollars.

14. That by the acts and conduct of the defendants as aforesaid, and pursuant thereto, and to accomplish such purposes, defendant Loose received, agreed to receive and accepted money, presents, rewards, gifts and promises or things of value from the other defendants and some other persons, whose names are unknown, and that same were used to influence the said Loose to favor the other defendants in pursuance of said conspiracy and confederation, and to accept, negotiate and execute contracts with the United States without regard to the merits of offers made by the other defendants or by other interested parties and against the interests of the United States.

15. That the defendants other than the defendant Loose agreed among themselves and others, whose names are unknown, to submit high, arbitrary or excessive bids or offers for the contracts herein mentioned and others, which defendant Loose, pursuant to and in aid of said conspiracy,

accepted or caused to be accepted in behalf of the United States, and the defendants did discourage, deter and prevent others from bidding thereon and prevented and deterred changes in specifications to be made, and all of the defendants confederated together to conceal such transactions and pursuant thereto, destroyed and altered records, books and documents which evidenced the existence of said conspiracy and the acts done pursuant thereto.

16. Wherefore, plaintiff demands judgment against each and every one of the defendants for the sum of Two Thousand ($2,000.00) Dollars for each of the actions and transactions done or committed by them or any other person under and pursuant to said agreement, confederation and conspiracy between the defendants, and in addition thereto, prays judgment for double the amount of damages which the court finds the United States has sustained and suffered by reason of said combination, confederation and conspiracy, and by said false, fraudulent and fictitious claims made or caused to be made by the defendants aforesaid, together with interest thereon at the legal rate and all costs of this action.

J. FRANCIS O'SULLIVAN,
700 Gloyd Building,
Kansas City, Missouri.

[fol. 7]

J. KENTNER ELLIOTT,
134 S. LaSalle Street,
Chicago, Illinois.

Attorneys for Plaintiff.

Filed in the United States District Court March 15, 1943.

(The foregoing First Amended Complaint was filed before any responsive pleading was filed by any of the defendants named in the original Petition to said original Petition.)

(Excerpt from Rule adopted June 17, 1942, relating to Motions.)

"(b) Submission of Motions.

(1) Motions, in general, shall be submitted and determined upon the motion papers hereinafter referred to. Oral arguments will be permitted on application and proper showing or when asked by the judge before whom motions are pending.

(2) The moving party shall serve and file with his motion and notice a brief written statement of the reasons in support of the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all photographs or documentary evidence he intends to present in support of the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure.

(3) Each party opposing the motion shall serve and file within five days from the time when a copy of the motion has been served upon him a brief written statement of the reasons in opposition to the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all documentary evidence or photographs which he intends to submit in opposition to the motion, in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure."

[fol. 8] (Motion of United States of America to Stay Proceedings.)

Comes now the United States of America by its attorney Maurice M. Milligan and moves this court to make and enter an order in this cause staying the proceedings herein until the conclusion of the trial in the case of United States of America vs. Baker-Lockwood Mfg. Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose, and Ben D. Christian, Criminal No. 15,555, now pending before this court, and as grounds therefor states:

That there are now pending before this court three civil causes including this cause, being civil numbers 1407, 1408, and 1411, involving the same party plaintiff, the same parties defendant, the same facts and circumstances, and all sought to be maintained under the "Informers Statute", Title 31 U. S. C. A., Secs. 231-234, inclusive; that but one of said suits can by law be maintained; that it is the intention of the War Frauds Unit of the Department of Justice of the United States to prosecute expeditiously and to a speedy conclusion the above styled and numbered criminal case referred to in the first paragraph hereof; that any proceedings of any of the civil cases numbered 1407, 1408, and 1411 before the trial of the criminal case would lead to and involve the taking of the depositions of the same witnesses who were subpoenaed before the United States grand jury which returned said indictment numbered 15,555 and would lead to and involve the issuance of subpoenas duces tecum to said witnesses calling for the production of records, correspondence, and other documentary evidence upon which the Department of Justice of the United States relies to establish the evidentiary facts necessary to support the charge of the indictment; that besides dissipating the energies of the representatives of the War Frauds Unit who are now engaged in the preparation of the above-numbered indictment 15,555 for trial, it would also enable the defendants by indirection to obtain the possession of evidence which they are not permitted by law directly to obtain; that the taking of depositions in any of the civil cases numbered 1407, 1408, and 1411 might likewise lead to the calling of military officers to be examined by the defendants and for the production of military records by which important military secrets might be unpropitiously disclosed; that all of such proceedings would be contrary to the public policy and the public interest; that the stay [fol. 9] of all proceedings in the said civil cases numbered 1407, 1408, and 1411 cannot in any manner prejudice or injuriously affect the interest of any of the parties thereto and that which of the said civil cases should be sustained to the exclusion of the others can be most properly determined only after entry of judgment by this court in the aforementioned criminal indictment numbered 15,555.

Wherefore Movant respectfully prays the court that all proceedings in said civil cases numbered 1407, 1408, and

1411 be stayed subject to and until further orders of this court.

MAURICE M. MILLIGAN,
United States Attorney for the Western Judicial District of Missouri.

Filed in the United States District Court April 9, 1943.

(The above Motion discloses no service of same upon any of the parties to said action, nor was it accompanied by or was there filed therewith any Notice, Written Statement of reasons in support thereof or Citation of authorities upon which Movant relies.)

(Record Entry of Denial of Motion of United States of America to Stay Proceedings; Motions of Defendants to Dismiss Taken Under Advisement, April 10, 1943.)

Now comes on for hearing the Motion of the United States to stay proceedings; defendant Baker-Lockwood Manufacturing Company's motion to dismiss; defendant W. L. Mellor's motion to dismiss and defendant Baker-Lockwood Manufacturing Company's motion to stay proceedings, heretofore filed herein. The parties hereto appearing by their respective attorneys, and said motions are taken up, argued and submitted. The Court denies motion of the United States to stay proceedings, and the defendants motions herein are taken under advisement.

[fol. 10] (Opinion and Order of District Court Overruling all Motions of Defendants to Dismiss and Staying Proceedings in Cases Nos. 1408 and 1411.)

One memorandum will suffice for the several motions to dismiss and the motions to stay proceedings in two of the three cases. A very short memorandum is sufficient. The theory of the motions to dismiss is that the "informer's statute," on which the cases are bottomed, originally the Act of March 2, 1863, now 31 U. S. C., Secs. 231-234, was repealed, by implication, by the enactment of the Act of

April 28, 1942, 56 Statutes 245. But the presumption is against repeal by implication. The provision for re-negotiation of contracts in the Act of April 28, to which reference is made, a provision for obviating excessive legitimate profits, in no way is inconsistent with the "informer's statute" which has to do with damages for fraud. The "informer's statute" was treated as in full force by the Supreme Court on January 18, 1943, long after the passage of the Act of April 28, 1942. See U. S. ex rel. vs. Hess (decided January 18, 1942), ... U. S. ..... It is difficult to believe that the Justices of our highest court, who give effect to recent legislation, and all its implications, before the ink is dry, would have analyzed so painstakingly and given effect so completely to an old law which had been put to sleep eight months before, if it had been put to sleep.

Case 1407 was filed February 13, 1943. Case 1408 was filed February 15, 1943. Case 1411 was filed February 17, 1943. Service on defendants in 1408 was ahead of service in 1407 and 1411. All of counsel agree that two of the suits should be stayed. Some of counsel think 1408 should have precedence, because defendants in that case were served with summons first. Obviously, however, precedence goes to the first two filed. The statute is for informers. The first to inform wins the miserable race. The United States is informed when the case is filed. Who cares when the man informed against is informed?

Order.

All motions to dismiss overruled. So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of the Court. So Ordered.

MERRILL E. OTIS,
Judge.

Filed in the United States District Court April 15, 1943.

[fol. 11] (Notice of Appeal Filed May 10, 1943.)

Notice is given that the United States of America, Plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause on the 10th of April, 1943, denying the application of the United States to stay proceedings therein.

UNITED STATES OF AMERICA,
Appellant,
By Maurice M. Milligan,
United States Attorney.

Copies of above notice of appeal mailed to Morrison, Nugent, Berger & Johns; Mr. Ira B. Burns; Henderson, Henderson & Swofford; Attorneys for defendant; J. Francis O'Sullivan, Attorney for plaintiff; and Mr. Haveth E. Mau, on May 10, 1943.

E. O'KEEFE,
Deputy Clerk.

Filed in the United States District Court May 10, 1943.

[fol. 12] (Notice of Appeal Filed May 15, 1943.)

Notice is hereby given that the United States of America, plaintiff herein, appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause, No. 1407, on the 10th day of April, 1943, denying the application of the United States to stay proceedings therein.

Further notice is given that the United States of America, plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause No. 1408, on the 15th day of April, 1943, staying proceedings in said cause until further order of the Court.

UNITED STATES OF AMERICA,
Appellant,
By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Henderson, Henderson and Swofford, attorneys for defendants, this 15th day of May, 1943.

L. S. SHAW,
Deputy Clerk.

Copy of above notice of appeal mailed to Morrison, Nugent, Berger & Johns; Mr. Ira B. Burns, Attorneys for defendant, J. Francis O'Sullivan, attorney for plaintiff, and Mr. Haveth E. Mau, on May 18th, 1943.

L. S. SHAW,
Deputy Clerk.

Filed in the United States District Court May 15, 1943.

[fol. 13] (Excerpts from Oral Opinion of the Court in Passing Upon Motions for Continuance in Criminal Case No. 15,629—United States vs. Baker-Lockwood Manufacturing Company, Inc., et al.)

"When one party to a case prevents the attendance of the adversary party's witnesses, that is a different thing from the mere absence of the witness beyond the seas or his mere inability to attend from some distant point. In this case these witnesses are not here because the United States prevents them from being here, for good reason, of course, for the best of reasons. The United States is not the Department of Justice. I have said that before. The United States is the sovereign and the sovereign is the plaintiff here, and the sovereign has prevented these witnesses from being here. It is not the ordinary case at all. The sovereign could have enabled them to be here by a turn of the hand, but there were good reasons why their presence elsewhere was deemed to be necessary. • • • I do not suppose that the success of the war effort depends upon some lieutenant colonel or officer of lesser rank who is in the United States on the first Monday in November. If he is regularly subpoenaed in sufficient time, the United States ought to produce him here, if his expenses are guaranteed in a proper manner, in the manner provided for by law. • • • If the Attorney General will not cooperate—and I am sure he will, because the present Attorney General I

regard as one of the most outstanding men who has filled that high office, certainly a man of the highest character and fairness—but if for some good and sufficient reason the Attorney General will not cooperate, then the ground for continuance because of the absence of that witness, if his testimony appears to be material, would be a very strong ground. * * * The case is passed and reset as to all defendants for the first Monday in November. Is there any other matter?

"Mr. O'Sullivan: If your Honor please, you had made some announcement with respect to case 1407. You said that its trial would succeed or come after the trial of this criminal case.

"The Court: I said that, provided that the criminal cases were tried when they were set.

"Mr. O'Sullivan: You have now tentatively set that for October 4th.

"The Court: That is when I intend to try it, October 4th. The civil case is set for October 4th. * * * So far as the [fol. 14] civil case is concerned it is to be tried * * * unless continued for cause."

Filed in the United States District Court July 12, 1943.

[fol. 15] (Designation of Matters to be Included in Transcript on Appeal and Service.)

The Clerk of the United States Court for the Western Judicial District of Missouri, will include in the transcript of the record on appeal in the above-entitled cause, the following records, documents, papers and exhibits:

(1) The Plaintiff's Complaint Filed Herein,

(2) The Plaintiff's First Amended Complaint,

(3) Motion of the United States to Stay Proceedings Filed April 9, 1943,

(4) The Clerk's Minutes of the Proceedings Through April 10, 1943,

(5) Record Order of April 10, 1943, Denying Motion of United States to Stay Proceedings.

UNITED STATES OF AMERICA,
Appellant,

By M. M. Milligan,
United States Attorney.

Receipt of a copy of the designation of matters to be included in the transcript of the record on appeal is hereby acknowledged this 23 day of July, 1943.

HENDERSON, HENDERSON & SWOFFORD.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon Ira B. Burns, Attorney for Dahne W. Winebrenner, by affiant by personally delivering a copy thereof to Wanda Wheatcroft, secretary to Ira B. Burns, at the latter's office, Tenth Floor, Bryant Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD, Clerk,
(Seal) Western District of Missouri,
By E. O'Keefe, D. C.

[fol. 16] Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was mailed to Francis Canny and Haveth

E. Mau, attorneys for Cornelius G. Loose on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served on Morrison, Nugent, Berger & Johns, Attorneys for Ben D. Christian, by affiant by personally delivering a copy thereof to Fontaine E. Potter, secretary to E. R. Morrison, at the latter's office, Seventeenth Floor, Bryant Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon J. Francis O'Sullivan, Attorney for Lou Nathanson, personally, by affiant by personally delivering a copy thereof to him at his office, Seventh Floor, Gloyd Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

[fol. 17] Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Filed in the United States District Court, July 23, 1943.

[fol. 18] (Plaintiff's Designation of Additional Portions of the Record, Proceedings, Etc., to be Included in the Transcript on Appeal.)

Plaintiff directs the Clerk of the United States District Court for the Western Division of the Western District of Missouri, to include in the transcript of the record on the appeal attempted to be taken by the United States of America through its District Attorney in the above entitled cause, the following additional records, documents, papers, exhibits and statements required and requested by plaintiff, to-wit:

1. Statement or certificate of the Clerk showing:

(a) The date of the filing of the original complaint and first amended complaint, and that said first amended complaint was filed before any responsive pleading to the original complaint was filed by any defendant.

(b) That the motion of the United States to stay proceedings in the above cause, filed April 9th, 1943, disclosed no service of same or notice thereof upon or to either plaintiff or defendants in said cause, and that no written statement of reasons in support of said motion, or citation of authorities upon which movant relied accompanied same or was filed therewith.

2. That portion of this court's Rule on Motions, promulgated June 17th, 1942, with respect to Submission of Motions."

3. Memorandum Opinion of Judge Otis filed April 15th, 1943, "On the Several Motions to Dismiss and the Several Motions to Stay Proceedings," together with the Clerk's Minutes thereon.

4. That portion of the Opinion of Judge Otis in passing on Motions for Continuance of Criminal Case No. 15629, United States vs. Baker-Lockwood, et al., contained on Pages 14, 15, 16, 17, 20, 21 and 22 thereof, as follows:

"When one party to a case prevents the attendance of the adversary party's witnesses, that is a different thing from the mere absence of the witness beyond the seas or his mere inability to attend from some distant point. In this case these witnesses are not here because the United States prevents them from being here, for good reason, of course, for the best of reasons. The United States is not [fol. 19] the Department of Justice. I have said that before. The United States is the sovereign and the sovereign is the plaintiff here, and the sovereign has prevented these witnesses from being here. It is not the ordinary case at all. The sovereign could have enabled them to be here by a turn of the hand, but there were good reasons why their presence elsewhere was deemed to be necessary. * * * I do not suppose that the success of the war effort depends upon some lieutenant colonel or officer of lesser rank who is in the United States on the first Monday in November. If he is regularly subpoenaed in sufficient time, the United States ought to produce him here, if his expenses are guaranteed in a proper manner, in the manner provided for by law. * * * If the Attorney General will not cooperate—and I am sure he will, because the present Attorney General I regard as one of the most outstanding men who has filled that high office, certainly a man of the highest character and fairness—but if for some good and sufficient reason the Attorney General will not cooperate, then the ground for continuance because of the absence of that witness, if his testimony appears to be material, would be a very strong ground. * * * The case is passed and reset as to all defendants for the first Monday in November. Is there any other matter?

"Mr. O'Sullivan: If your Honor please, you had made some announcement with respect to case 1407. You said that its trial would succeed or come after the trial of this criminal case.

"The Court: I said that, provided that the criminal cases were tried on July 12th.

"Mr. O'Sullivan: You have now tentatively set that for October 4th.

"The Court: That is when I intend to try it, October 4th. The civil case is set for October 4th. * * * So far as the civil case is concerned it is to be tried * * * unless continued for cause.

J. FRANCES O'SULLIVAN,
Attorney for Plaintiff,
700 Gloyd Building,
Kansas City, Missouri.

Receipt of copy of the plaintiff's Designation of Additional Matters to be Included in the Transcript of the Record on Appeal is hereby acknowledged this 26th day of [fol. 20] July, 1943.

HENDERSON, HENDERSON & SWOFFORD,
By Ben W. Swofford,
Attorneys for Defendants, Baker-Lockwood Mfg. Co. Inc. and W. L. Mellor.

RICHARD K. PHELPS,
Asst. United States District Attorney.

Filed in the United States District Court, July 26, 1943.

[fol. 21] (Clerk's Certificate to Transcript.)

United States of America,—Sct.:

I, A. L. Arnold, Clerk of the United States District Court for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the Designations filed herein and made a part hereof, in the cause wherein The United States of America, at the relation of and to the use of Lou Nathanson is Plaintiff and Baker-Lockwood Manufacturing Company, Inc., et al., are Defendants, as fully as the same appears on file and of record in my office.

Seal
U. S. Dist. Court
West. Div.
Western Dist.
of Missouri

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 29th day of July, A. D., 1943.

A. L. ARNOLD,
Clerk, U. S. District Court.
By H. C. Spaulding,
Deputy Clerk.

Filed Jul. 31, 1943. E. E. Koch, Clerk.

[fol. 22] (Order extending time to file Transcript of Record.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943
Wednesday, July 21, 1943.

United States of America, at the relation and to the use of Lou Nathanson, Plaintiff,

vs.

Baker-Lockwood Manufacturing Co., Inc., W. L. Mellor, Dahne W. Winebrenner (alias Murray Bailey), Cornelius G. Loose, Ben D. Christian, Defendants.

This matter comes before the Court on an application for extension of time for filing record on appeal, the United States being represented by Richard K. Phelps, Assistant United States Attorney, and plaintiff Lou Nathanson, being represented by Mr. J. Francis O'Sullivan, and the Court being advised,

It is Ordered that the motion be granted and that appellant the United States be given until on or before August 2, 1943, to file its record on appeal in this cause.

July 21, 1943

[fol. 23] (Order denying Motion to Stay Proceedings; Consolidating cases and setting cases for hearing at September Term, 1943.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.
Tuesday, July 27, 1943.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Lou Nathanson (Plaintiff in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Company, Inc., et al.) Baker-Lockwood Manufacturing Company, Inc., a corporation, et al., Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Baker-Lockwood Manufacturing Company, Inc., et al.
Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Benjamin P. Pink, (Plaintiff in United States of America, ex rel Benjamin P. Pink, and Benjamin P. Pink in his own behalf vs. Baker-Lockwood Manufacturing Company, et al,) Baker-Lockwood Manufacturing Company, et al, Appellees.

[fol. 24] Mr. Joseph M. Friedman, Attorney, Department of Justice, and Mr. Richard K. Phelps, Assistant United States Attorney, for United States of America, appellant.

Mr. J. Francis O'Sullivan, for appellee Lou Nathanson.

On motion of the United States of America to stay further proceedings pending appeal.

The motion of the United States of America to stay all further proceedings in the District Court during the pendency of the appeals taken in each of the three above-entitled cases, appearing on the docket of the District Court as Civil Actions Numbers 1407, 1408 and 1411, is denied.

On the Court's own motion, the appeals in the three cases are consolidated for hearing and are hereby set for hearing before Division No. 1 of the Court at the session at St. Paul, Minnesota, on Wednesday, September 8, 1943. The parties are given leave to file consolidated briefs, if they so desire the printed record and printed brief of the appellant to be served and filed on or before August 16, 1943, with the regular number of copies, and printed brief of appellees to be served and filed on or before September 2, 1943, with the regular number of copies, and reply brief of appellant to be served and filed on or before September 8, 1943, the reply brief being permitted to be in typewritten form and four copies thereof to be filed.

July 27, 1943.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,674
CIVIL.

UNITED STATES OF AMERICA, APPELLANT,
vs.
BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., W. L. MELLOR, DAHNE W. WINEBRENNER, CORNELIUS G. LOOSE AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1943.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,674

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., W. L. MELLOR, DAHNE W. WINEBRENNER, CORNELIUS G. LOOSE AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1943.

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[fol. 1] United States of America,—Sct.:

Be it remembered that heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 15th day of February, 1943, there was filed in the office of the Clerk of said court a Complaint in the cause wherein The United States of America is Plaintiff and Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian are Defendants.

Said Complaint is as follows:

(Complaint.)

In the District Court of the United States For the Western District of Missouri, Western Division.

The United States of America, Plaintiff,
No. 1408. vs. Civil Action.
Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian, Defendants.

(1) This is a civil action brought by the United States of America as plaintiff of which this Court has jurisdiction under Section 24(1) of the Judicial Code, as amended, (28 U. S. C. 41(1)) and is a suit brought under Sections 3490 to 3492, inclusive, and Section 5438 of the Revised Statutes (31 U. S. C. 231-233) of which this Court has jurisdiction under Section 3491 of the Revised Statutes (31 U. S. C. 232).

(2) On information and belief, the defendant, Baker-Lockwood Manufacturing Company, Inc., is a corporation organized under the laws of the State of Missouri, with its principal place of business at North Kansas City, Missouri.

(3) On information and belief, the defendant, W. L. Mellor, at all times herein mentioned, was the president of Baker-Lockwood Manufacturing Company, Inc.

(4) On information and belief, the defendant, Dahne W. Winebrenner, at all times herein mentioned, was the gen-[fol. 2] eral manager of Baker-Lockwood Manufacturing Company, Inc.

(5) On information and belief, the defendant, Cornelius G. Loose, at all times herein mentioned, was Principal Administrative Officer, General Procurement Branch of the Contract Section, Materiel Center, Army Air Force, Wright Field, Dayton, Ohio, whose duties included the negotiations for and awards of contracts for the manufacture of aircraft field maintenance shelters and similar equipment.

(6) On information and belief, the defendant, Ben D. Christian, at all times herein mentioned, was president of Safway Steel Products Company, a corporation with its principal place of business in Milwaukee, Wisconsin.

(7) None of the defendants is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

(8) The defendant, Baker-Lockwood Manufacturing Company, Inc., was engaged in the manufacture of canvas products and through its officers and agents the defendants, W. L. Mellor and Dahne W. Winebrenner, negotiated with the defendant, Cornelius G. Loose, in his official capacity, for the award of contracts for the sale to the United States of aircraft maintenance shelters and similar equipment.

Safway Steel Products Company was engaged in the manufacture of steel products and through its president the defendant, Ben D. Christian, negotiated with the defendant, Cornelius G. Loose, in his official capacity, for the award of contracts for the sale to the United States of aircraft maintenance shelters and similar equipment.

That said corporations, Baker-Lockwood Manufacturing Company, Inc., and Safway Steel Products Company, as a result of the negotiations aforementioned, did obtain the award of various contracts for the sale of aircraft maintenance shelters and similar equipment to the United States Army Air Force.

(9) That in connection with the sale of the aforementioned aircraft maintenance shelters and similar equip-

ment the defendants, in violation of the provisions of Sections 3490 and 5438 of the Revised Statutes (31 U. S. C. 231), and other statutes of the United States of America, as hereinafter more fully appears

[fol. 3] (a) made and caused to be made, and presented and caused to be presented to the United States of America numerous claims knowing that such claims were false, fictitious and fraudulent; and

(b) for the purpose of obtaining and aiding the payment and approval of said claims made, used and caused to be made and used, false bills, receipts, vouchers, accounts, claims and certificates, knowing the same to contain fraudulent and fictitious statements and entries; and

(c) entered into an agreement, combination and conspiracy to defraud the Government of the United States by obtaining and aiding to obtain the payment and allowance of false and fraudulent claims.

(10) The false, fraudulent and fictitious claims hereinabove referred to consisted, among other things, of the following: Prior to the award of the respective contracts obtained by the defendants, Baker-Lockwood Manufacturing Company, Inc., and Safway Steel Products Company, the officers and agents of said corporations who conducted the negotiations therefor, for the purpose of charging and collecting exorbitant and excessive prices for aircraft maintenance shelters, and similar equipment, entered into certain corrupt arrangements with the defendant, Cornelius G. Loose, for the abuse by him of his official capacity, whereby the bids of competing firms were intentionally discouraged and precluded; whereby specifications respecting proposed contracts were so prepared as to favor said corporations and to render bidding by competing firms difficult; and whereby bidders were intimidated into making sub-contracts for canvas with Baker-Lockwood Manufacturing Company, Inc., in order to obtain awards of prime contracts; and various other corrupt and illegal practices were engaged in by the defendants directed to the ultimate purpose of charging the United States of America excessive and exorbitant prices for aircraft maintenance shelters and similar equipment. That as a result of the aforedescribed acts, large sums of money were

paid by the United States representing excessive and exorbitant prices for aircraft maintenance shelters and similar equipment which the claimants thereof were not legally en-
[fol. 4] titled to collect or retain, and the United States has therefore been damaged by the payment of false, fraudulent and fictitious claims in an amount which is presently unknown.

(11) By reason of the premises each and every of the defendants became, and is liable to forfeit and pay to the United States the sum of $2,000 for each of the acts and transactions hereinabove described which may be found by this Court to constitute false, fraudulent and fictitious claims and, in addition, double the amount of the damages which the Court finds the United States has sustained by reason of the doing or committing of such acts.

Wherefore, plaintiff demands judgment against each and every of the defendants for the sum of $2,000 for each of the acts and transactions found by this Court to constitute false, fraudulent and fictitious claims against the United States and, in addition, double the amount of damages which the Court finds the United States has sustained by reason of such false, fraudulent and fictitious claims, together with interest and costs of this action.

M. M. MILLIGAN,
United States Attorney.

(Separate Motion of Defendants Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings)

Come now defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in the above entitled cause and respectfully request the court to make and enter an order in this cause staying the proceedings herein, and as grounds therefor allege and state that there is now pending in this court three causes of action, including this suit, involving the same parties plaintiff and the same parties defendant, and the same facts and circumstances, and all of said suits are sought to be maintained under the Informer's Statute, Title 31 U. S. C., Sections 231-234, inclusive, (Sec. 3490 Revised Statutes); that the other two

suits so pending are: "United States of America, at the relation of and to the use of Lou Nathanson, plaintiff vs. Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, (alias Murray Bailey), [fol. 5] Cornelius G. Loose and Ben D. Christian, defendants, No. 1407; and "United States of America, ex rel Benjamin P. Pink, and Benjamin P. Pink, in his own behalf, plaintiff, vs. Baker-Lockwood Manufacturing Company, a corporation, W. L. Mellor, Dahne Winebrenner and Ben D. Christian, defendants, No. 1411."

Wherefore, defendants respectfully request the court to make and enter an order staying proceedings herein.

HENDERSON, HENDERSON & SWOFFORD,
By M. J. Henderson,
531 Scarritt Bldg., K. C. Mo.
Vi. 0800, Attys. for defts.
Baker-Lockwood Mfg. Co., Inc.,
and W. L. Mellor.

Filed in the United States District Court, March 25, 1943.

(Separate Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss Cause)

Come now defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in the above entitled cause, and respectfully request the court to make and enter an order in this cause dismissing plaintiff's cause of action as to these defendants, under Rule 12, Federal Rules of Civil Procedure, and as grounds therefor allege and state;

(1) This court lacks the proper jurisdiction of the subject matter and persons of these defendants sufficient to proceed in this action.

(2) The petition fails to state a claim upon which relief can be granted by this court as against these defendants under the Informer's Statute, Title 31, U. S. C. Section 231, to 234, inclusive, (Sec. 3490 R. S.).

Wherefore these defendants pray that this suit be dismissed.

HENDERSON, HENDERSON & SWOFFORD,
By M. J. Henderson,
531 Scarritt Bldg., K. C. Mo.
Vi. 0800 Attys. for defts.
Baker-Lockwood Mfg. Co. & W. L. Mellor.

Filed in the United States District Court, March 25, 1943.

[fol. 6] (Affidavit of Maurice M. Milligan)

State of Missouri,
County of Jackson—ss.:

Maurice M. Milligan, being first duly sworn, upon his oath deposes and says that he is, and at all times referred to herein was, the duly appointed United States Attorney and acting as such in and for the Western District of Missouri; that on February 12, 1943, an indictment was found and returned in the case entitled United States vs. Baker-Lockwood, et al., Criminal No. 15,555, by the Grand Jury then sitting; that on February 13, 1943, affiant received a letter bearing date February 11, 1943, and signed Francis M. Shea, Assistant Attorney General which letter stated that a draft of a complaint had been prepared and which recommended that the complaint be filed by affiant at the same time as the said indictment; that affiant found no such draft of complaint enclosed with said letter; affiant further states upon information and belief that on the same day, to-wit:

February 13, 1943, H. Schwartzberg, an attorney in the Claims Division of the Department of Justice, contacted affiant's office by long distance telephone from Washington, D. C., and inquired whether the said complaint had been received; that upon being informed that the complaint was not found enclosed with the letter as aforesaid, H. Schwartzberg stated that he would send a copy of the complaint by airmail for filing; that on Monday, February 15, 1943, affiant received a letter bearing date February 13, 1943, and signed Francis M. Shea, Assistant Attorney General,

with which was enclosed a copy of a complaint which complaint was filed with the Clerk of the United States District Court for the Western District of Missouri within an hour after the opening of the office of the said Clerk on the morning of February 13, 1943, and that the complaint so filed is the same complaint by which the case of United States vs. Baker-Lockwood, et al., Civil No. 1408, was instituted.

Affiant further states upon information and belief that the United States Department of Justice at Washington, D. C., did fully intend that the aforementioned complaint should be enclosed with said letter dated February 11, [fol. 7] 1943, and only through a clerical oversight or mistake was it not so included, that but for said clerical oversight or mistake the said complaint would have in the usual course been filed with the Clerk of the United States District Court for the Western District of Missouri on the morning of February 13, 1943, and prior in time to the filing of the complaint in the case of U. S. ex rel Lou Nathanson vs. Baker-Lockwood, et al., which was filed on February 13, 1943, after 3:00 o'clock P. M.

Affiant further states upon information and belief that the complaint in the case of U. S. ex rel Lou Nathanson vs. Baker-Lockwood, et al. Civil No. 1407 is not based upon any information obtained by said Lou Nathanson in advance of the return of the indictment in the case of U. S. vs. Baker-Lockwood, et al., Criminal No. 15,555, on February 12, 1943, and that said complaint was not drafted until February 13, 1943 on which date said Lou Nathanson travelled to Kansas City, Missouri, by airplane.

MAURICE M. MILLIGAN.

Subscribed and sworn to before me this 9th day of April, A. D., 1943.

(Seal)

A. L. ARNOLD,
Clerk.
By H. C. Spaulding,
Deputy.

Filed in the United States District Court, April 12, 1943.

(Record Entry of Overruling of Motions to Dismiss; Proceedings in Cases 1408 and 1411 stayed until further order of Court, April 15, 1943.)

The Court having heretofore heard arguments of counsel on all of the several motions to dismiss and the motions to stay proceedings in the above causes, and now being well and fully advised in the premises; All motions to dismiss are overruled. It Is So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of this Court. It Is So Ordered.

[fol. 8] (Opinion and Order of District Court overruling all Motions of Defendants to Dismiss and Staying proceedings in Cases Nos. 1408 and 1411.)

One memorandum will suffice for the several motions to dismiss and the motions to stay proceedings in two of the three cases. A very short memorandum is sufficient. The theory of the motions to dismiss is that the "informer's statute," on which the cases are bottomed, originally the Act of March 2, 1863, now 31 U.S.C., Secs. 231-234, was repealed, by implication, by the enactment of the Act of April 28, 1942, 56 Statutes 245. But the presumption is against repeal by implication. The provision for renegotiation of contracts in the Act of April 28, to which reference is made, a provision for obviating excessive legitimate profits, in no way is inconsistent with the "informer's Statute" which has to do with damages for fraud. The "Informer's statute" was treated as in full force by the Supreme Court on January 18, 1943, long after the passage of the Act of April 28, 1942. See U. S. ex rel vs. Hess (decided January 18, 1942), ... U. S. .... It is difficult to believe that the Justices of our highest court, who give effect to recent legislation, and all its implications, before the ink is dry, would have analyzed so painstakingly and given effect so completely to an old law which had been put to sleep eight months before, if it had been put to sleep.

Case 1407 was filed February 13, 1943. Case 1408 was filed February 15, 1943. Case 1411 was filed February 17, 1943. Service on defendants in 1408 was ahead of

service in 1407 and 1411. All of counsel agree that two of the suits should be stayed. Some of counsel think 1408 should have precedence, because defendants in that case were served with summons first. Obviously, however, precedence goes to the first who filed. The statute is for informers. The first to inform wins the miserable race. The United States is informed when the case is filed. Who cares when the man informed against is informed?

Order.

All motions to dismiss overruled. So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of the Court. So Ordered.

MERRILL E. OTIS,
Judge.

Filed in the United States District Court April 15, 1943.

[fol. 9] (Notice of Appeal, May 7, 1943).

Notice is given that the United States of America, Plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause on the 15th day of April, 1943, staying proceedings in said cause until further order of the Court.

UNITED STATES OF AMERICA,
Appellant.

By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Morrison, Nugent, Berger, and Johns; Henderson, Henderson & Swofford; Ira B. Burns and Haveth E. Mau, Attorneys for defendants, this 7th day of May, 1943.

E. O'KEEFE,
Deputy Clerk.

Filed in the United States District Court May 7, 1943.

(Notice of Appeal, May 15, 1943).

Notice is hereby given that the United States of America, plaintiff herein, appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause, No. 1407, on the 10th day of April, 1943, denying the application of the United States to stay proceedings therein.

Further notice is given that the United States of America, plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause No. 1408, on the 15th day of April, 1943, staying proceedings in said cause until further order of the Court.

UNITED STATES OF AMERICA,
Appellant.

By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Morrison, Nugent, Berger and Johns; Henderson, Henderson & Swof-
[fol. 10] ford; Ira B. Burns and Haveth E. Mau, Attorneys for defendants this 15th day of May, 1943.

L. S. SHAW,
Deputy Clerk.

Filed in the United States District Court May 15, 1943.

[fol. 11] (Designation of Matters to be Included in the Transcript of the Record on Appeal.)

The Clerk of the United States Court for the Western Judicial District of Missouri, will include in the transcript of the record on appeal in the above entitled cause, the following records, documents, papers and exhibits:

(1) The Plaintiff's Complaint filed herein,

(2) Separate Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings filed March 25, 1943.

(3) Separate Motion of Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss Cause filed March 25, 1943.

(4) Affidavit of Maurice M. Milligan filed April 12, 1943.

(5) The Clerk's Minutes of the Proceedings through April 15, 1943.

(6) Memorandum Opinion and Order on Motions to Dismiss and Motions to Stay filed April 15, 1943.

UNITED STATES OF AMERICA,
Appellant.

By M. M. Milligan,
United States Attorney.

Receipt of a copy of the designation of matters to be included in the transcript of the record on appeal is hereby acknowledged this 23rd day of July, 1943.

HENDERSON, HENDERSON & SWOFFORD.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was mailed to Francis Canny and Haveth E. Mau, attorneys for Cornelius G. Loose, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD,
Clerk, Western District of Missouri.

[fol. 12] (Seal) By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon J. Francis O'Sullivan, Attorney for Lou Nathanson, personally, by affiant by personally delivering a copy thereof to him at his office, Seventh Floor, Gloyd Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD,
Clerk, Western District of Missouri,
(Seal) By E. O'Keefe, D. C.

Filed in the United States District Court July 23, 1943.

[fol. 13] (Clerk's Certificate to Transcript.)

United States of America, Sct.:

I, A. L. Arnold, Clerk of the United States District Court for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the Designation filed herein and made a part hereof, in the cause wherein The United States of America is Plaintiff and Baker-Lockwood Manufacturing Company, et al, are Defendants, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 29th day of July, A. D. 1943.

Seal
U. S. Dist. Court
West. Div.
West. Dist.
of Mo.

A. L. ARNOLD,
Clerk, U. S. District Court.
By H. C. Spaulding,
Deputy Clerk.

Filed July 31, 1943, E. E. Koch, Clerk.

[fol. 14] (Order extending time to file Transcript of Record.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.

Wednesday, July 21, 1943.

United States of America, Plaintiff,

vs.

Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian, Defendants.

This matter comes before the Court on an application for extension of time for filing record on appeal, the United States being represented by Richard K. Phelps, Assistant United States Attorney, there being no representation for other parties but it being stated by Mr. Phelps that there is no opposition to the granting of said motion, and the Court being advised,

It is Ordered that the motion be granted and that appellant the United States be given until on or before August 2, 1943, to file its record on appeal in this cause.

July 21, 1943.

[fol. 15] (Order denying Motion to Stay Proceedings; Consolidating cases and setting cases for hearing at September Term, 1943.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.

Tuesday, July 27, 1943.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,

No. ..... vs.

Lou Nathanson (Plaintiff in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Company, Inc., et al.) Baker-Lockwood Manufacturing Company, Inc., a corporation, et al., Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Baker-Lockwood Manufacturing Company, Inc., et al.
Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Benjamin P. Pink, (Plaintiff in United States of America, ex rel Benjamin P. Pink, and Benjamin P. Pink in his own behalf vs. Baker-Lockwood Manufacturing Company, et al.) Baker-Lockwood Manufacturing Company, et al., Appellees.

[fol. 16] Mr. Joseph M. Friedman, Attorney, Department of Justice, and Mr. Richard K. Phelps, Assistant United States Attorney, for United States of America, appellant.

Mr. J. Francis O'Sullivan, for appellee Lou Nathanson.

On motion of the United States of America to stay further proceedings pending appeal.

The motion of the United States of America to stay all further proceedings in the District Court during the pendency of the appeals taken in each of the three above-entitled cases, appearing on the docket of the District Court as Civil Actions Numbers 1407, 1408 and 1411, is denied.

On the Court's own motion, the appeals in the three cases are consolidated for hearing and are hereby set for hearing before Division No. 1 of the Court at the session at St. Paul, Minnesota, on Wednesday, September 8, 1943. The parties are given leave to file consolidated briefs, if they so desire, the printed record and printed brief of the appellant to be served and filed on or before August 16, 1943, with the regular number of copies, and printed brief of appellees to be served and filed on or before September 2, 1943, with the regular number of copies, and reply brief of appellant to be served and filed on or before September 8, 1943, the reply brief being permitted to be in typewritten form and four copies thereof to be filed.

July 27, 1943.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,675
CIVIL.

UNITED STATES OF AMERICA, APPELLANT,
vs.
BAKER-LOCKWOOD MANUFACTURING COMPANY, A CORPORATION, W. L. MELLOR (FIRST NAME UNKNOWN), DAHNE WINEBRENNER, CORNELIUS G. LOOSE, AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1909.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,675

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, A CORPORATION, W. L. MELLOR (FIRST NAME UNKNOWN), DAHNE WINEBRENNER, CORNELIUS G. LOOSE, AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1943.

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[fol. 1] United States of America, Set.:

Be it remembered that heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 17th day of February, 1943, there was filed in the office of the clerk of said court a Petition in the cause wherein United States of America, ex rel. Benjamin P. Pink, and Benjamin P. Pink, in his own behalf, is Plaintiff and Baker-Lockwood Manufacturing Company, a corporation, W. L. Mellor, Dahne Winebrenner, Cornelius G. Loose and Ben D. Christian are Defendants.

Said Petition is as follows:

(Petition.)

United States District Court, Western District of Missouri, Western Division.

United States of America, ex rel. Benjamin P. Pink, and Benjamin P. Pink, in his own behalf, Keith Theatre Bldg., Cincinnati, Ohio, Plaintiff,

No. 1411 vs.

Baker-Lockwood Manufacturing Company, a corporation, North Kansas City, Missouri,

W. L. Mellor (first name unknown) c/o Baker-Lockwood Manufacturing Co., North Kansas City, Missouri,

Dahne Winebrenner, c/o Baker-Lockwood Manufacturing Co., North Kansas City, Missouri,

Cornelius G. Loose, Address unknown, Last known address Washington, D. C.,

Ben D. Christian, c/o Safway Steel Products Co., Milwaukee, Wisconsin, Defendants.

Plaintiff states that he is a resident and citizen of the State of Ohio. That he brings this action on his own

behalf and on behalf of the United States of America. That the defendants are residents and citizens of the States of Missouri and Wisconsin, and of the District of Columbia, and that this is an action for the benefit of the United States of America, and that the amount involved in this action is in excess of $3,000.00 exclusive of interest and costs.

[fol. 2] Plaintiff states that the defendants, Baker-Lockwood Manufacturing Company, a corporation, W. L. Mellor, Dahne Winebrenner and Ben D. Christian, conspired with the defendant, Cornelius G. Loose, who was then in the employ of the Procurement Division of the United States of America, at Dayton, Ohio, whereby said defendant, Cornelius G. Loose, would inform various persons and companies who desired to make bids for the purpose of entering into contracts with the United States of America that such bids would be accepted if they agreed to give sub-contracts to the defendant company, Baker-Lockwood Manufacturing Company, for such of the work and material handled by the defendant, Baker-Lockwood Manufacturing Company. That by fraud and collusion the said defendants agreed to increase the amounts charged to the United States of America on their respective contracts, and further agreed to reimburse and pay part of said amount to the defendant, Cornelius G. Loose.

Plaintiff states that in pursuance of said fraudulent and collusive agreement, claims were presented by the defendants, Baker-Lockwood Manufacturing Company, W. L. Mellor, Dahne Winebrenner and Ben D. Christian to the United States of America in an amount of $750,000.00, in excess of the ordinary and reasonable amount for work, material and labor furnished, and that said defendants disbursed said amount of $750,000.00 to the individual defendants herein, the corporate defendant herein, and in part to the defendant, Cornelius G. Loose.

Plaintiff states that said conduct and action of these defendants and each of them was carried out as aforesaid and in pursuance thereof they presented and caused to be presented for approval and payment by an officer in the civil, military or naval service of the United States,

claims upon and against the government of the United States in an amount of $750,000.00, in excess of the true amount due them, said defendants knowing that such claim and claims were false, fictitious and fraudulent. That as a result thereof the United States of America has paid, and caused to be paid to said defendants said fraudulent, false and fictitious claim in the amount of $75,000.00, whereby and as a direct result thereof the United States of America was defrauded of the aforesaid sum of $750,000.00.

Plaintiff states that he brings this action under the provisions of Sections 3490, 3491 and 3493 of the U. S. Code [fol. 3] (31-U.S.C. Secs. 231-234) and that he is entitled to recover from the defendants, and each of them, twice the amount of said false, fraudulent and fictitious claim, to-wit, $1,500,000.00, for the benefit of the United States of America.

Wherefore, plaintiff prays the Court for a judgment against the defendants jointly and severally for the amount of $1,500,000.00, and for any and all other relief that is proper, either in equity or in law.

SOL GOODMAN,
First Nat'l Bk. Bldg.,
Cincinnati, Ohio.

BENJAMIN P. PINK,
Keith Theatre Bldg.,
Cincinnati, Ohio.

Attorneys for Plaintiff.

United States of America,
State of Ohio,
County of Hamilton—ss.:

Benjamin P. Pink, being first duly sworn on oath, deposes and says, that he is the Plaintiff in the above styled cause, and that the facts stated in the foregoing Petition are true as he verily believes.

BENJAMIN P. PINK.

Sworn to before me and subscribed in my presence this 16th day of February, 1943.

R. R. BOWEN,
(Seal) Notary Public, Hamilton County, Ohio.

My Commission expires April 17, 1943.

Praecipe.

To the Clerk:—

Issue summons on the defendants and each of them, returnable according to law. Endorse: "Action for the recovery of $1,500,000.00 and plaintiff's costs, and other relief."

SOL GOODMAN
and
BENJAMIN P. PINK,
Attorneys for Plaintiff.

(Separate Motion of Defendants Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings)

Come now defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in the above entitled cause and respectfully request the court to make and enter an order in this cause staying the proceedings herein, and as grounds therefor allege and state that there is now pending in this court three causes of action, including this suit, involving the same parties plaintiff, and the same parties defendant, and the same facts and circumstances, and all of said suits are sought to be maintained under the Informer's Statute, Title 31 U.S.C., Section 231-234, inclusive, (Sec. 3490 Revised Statutes); that the other two suits so pending are: "United States of America, at the relation of and to the use of Lou Nathanson, plaintiff, vs. Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, Dahne W. Winebrenner, (alias Murray Bailey) Cornelius G. Loose and Ben D. Christian, defendants, No. 1407, and "United States of America, plaintiff, vs. Baker-Lockwood Manufacturing Company, Inc., W. L. Mel-

lor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian, defendants, No. 1408".

Wherefore, defendants respectfully request the court to make and enter an order staying proceedings herein.

[fol. 4]

HENDERSON, HENDERSON & SWOFFORD,
By M. J. Henderson,
531 Scarritt Bldg., K. C. Mo.
Vi. 0800-Attys. for defts.
Baker-Lockwood Mfg. Co., Inc.,
and W. L. Mellor.

Filed in the United States District Court March 25, 1943.

(Separate Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss Cause)

Come now defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in the above entitled cause, and respectfully request the court to make and enter an order in this cause dismissing plaintiff's cause of action as to these defendants, under Rule 12, Federal Rules of Civil Procedure, and as grounds therefor allege and state:

(1) This court lacks the proper jurisdiction of the subject matter and persons of these defendants sufficient to proceed in this action.

(2) The petition fails to state a claim upon which relief can be granted by this court as against these defendants under the Informer's Statute, Title 31, U.S.C. Section 231, to 234, inclusive, (Sec. 3490 R. S.).

Wherefore, these defendants pray that this suit be dismissed.

HENDERSON, HENDERSON & SWOFFORD,
By M. J. Henderson,
531 Scarritt Bldg., K. C. Mo.
Vi. 0800, Attys. for defts.
Baker-Lockwood Mfg. Co., Inc.,
and W. L. Mellor.

Filed in the United States District Court March 25, 1943.

[fol. 5] (Record Entry of overruling of Motions to Dismiss; Proceedings in Cases 1408 and 1411 stayed until further Order of Court, April 15, 1943.)

The Court having heretofore heard arguments of counsel on all of the several motions to dismiss and the motions to stay proceedings in the above causes, and now being well and fully advised in the premises; All Motions to dismiss are overruled. It Is So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of this Court. It Is So Ordered.

[fol. 6] (Opinion and Order of District Court Overruling All Motions of Defendants to Dismiss and Staying Proceedings in Cases Nos. 1408 and 1411.)

One memorandum will suffice for the several motions to dismiss and the motions to stay proceedings in two of the three cases. A very short memorandum is sufficient. The theory of the motions to dismiss is that the "informer's statute," on which the cases are bottomed, originally the Act of March 2, 1863, now 31 U. S. C., Secs. 231-234, was repealed, by implication, by the enactment of the Act of April 28, 1942, 56 Statutes 245. But the presumption is against repeal by implication. The provision for re-negotiation of contracts in the Act of April 28, to which reference is made, a provision for obviating excessive legitimate profits, in no way is inconsistent with the "informer's statute" which has to do with damages for fraud. The "informer's statute" was treated as in full force by the Supreme Court on January 18, 1943, long after the passage of the Act of April 28, 1942. See U. S. ex rel. vs. Hess (decided January 18, 1942), ... U. S. ..... It is difficult to believe that the Justices of our highest court, who give effect to recent legislation, and all its implications, before the ink is dry, would have analyzed so painstakingly and given effect so completely to an old law which had been put to sleep eight months before, if it had been put to sleep.

Case 1407 was filed February 13, 1943. Case 1408 was filed February 15, 1943. Case 1411 was filed February 17, 1943. Service on defendants in 1408 was ahead of service in 1407 and 1411. All of counsel agree that two of the suits should be stayed. Some of counsel think 1408 should have precedence, because defendants in that case were served with summons first. Obviously, however, precedence goes to the first who filed. The statute is for informers. The first to inform wins the miserable race. The United States is informed when the case is filed. Who cares when the man informed against is informed?

Order

All motions to dismiss overruled. So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of the Court. So Ordered.

MERRILL E. OTIS,
Judge.

Filed in the United States District Court, April 15, 1943.

[fol. 7] (Notice of Appeal, May 7, 1943.)

Notice is given that the United States of America, one of the plaintiffs herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above entitled cause on the 15th day of April, 1943, staying proceedings herein until further orders of the Court.

UNITED STATES OF AMERICA,
Appellant.

By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Benjamin P. Pink, atty. for plaintiff; and Henderson, Henderson & Swofford; Morrison, Nugent, Berger & Johns; Ira B. Burns, attorneys for defendants May 7th, 1943.

E. O'KEEFE,
Deputy Clerk.

Filed in the United States District Court, May 7, 1943.

(Notice of Appeal, May 15, 1943.)

Notice is hereby given that the United States of America, plaintiff herein, appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause, No. 1407, on the 10th day of April, 1943, denying the application of the United States to stay proceedings therein.

Further notice is given that the United States of America, plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause No. 1408, on the 15th day of April, 1943, staying proceedings in said cause until further order of the Court.

UNITED STATES OF AMERICA,
Appellant.

By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Henderson, Henderson & Swofford, Attorneys for defendants, this 15th day of May, 1943.

L. S. SHAW,
Deputy Clerk.

[fol. 8]

Copy of above notice of appeal mailed to Benjamin P. Pink, attorney for plaintiff, Morrison, Nugent, Berger & Johns; Mr. Ira B. Burns, attorneys for defendants on May 18th, 1943.

L. S. SHAW,
Deputy Clerk.

Filed in the United States District Court, May 15, 1943.

[fol. 9] (Designation of Matters to be Included in the Transcript of the Record on Appeal.)

The Clerk of the United States Court for the Western Judicial District of Missouri, will include in the transcript of the record on appeal in the above entitled cause, the following records, documents, papers and exhibits:

(1) The Plaintiff's Complaint filed herein,

(2) Separate Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings filed March 25, 1943.

(3) Separate Motion of Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss Cause filed March 25, 1943.

(4) The Clerk's Minutes of the Proceedings through April 15, 1943.

(5) Memorandum Opinion and Order on Motions to Dismiss and Motions to Stay filed April 15, 1943.

UNITED STATES OF AMERICA,
Appellant.

By M. M. Milligan,
United States Attorney.

Receipt of a copy of the designation of matters to be included in the transcript of the record on appeal is hereby acknowledged this 23 day of July, 1943.

HENDERSON, HENDERSON & SWOFFORD.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was mailed to Benjamin P. Pink on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

[fol. 10] Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon J. Francis O'Sullivan, Attorney for Lou Nathanson, personally, by affiant by personally delivering a copy thereof to him at his office, Seventh Floor, Gloyd Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon Morrison, Nugent, Berger & Johns, Attorneys for Ben D. Christian, by affiant by personally delivering a copy thereof to Fontaine E. Potter, secretary to E. R. Morrison, at the latter's office, Seventeenth Floor, Bryant Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation

of Matters to be Included in the Transcript of the Record on Appeal was served upon Ira B. Burns, Attorney for Dahne W. Winebrenner, by affiant by personally delivering a copy thereof to Wanda Wheatcroft, secretary to Ira B. Burns, at the latter's office, Tenth Floor, Bryant Build-
[fol. 11] ing, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD, Clerk,
(Seal) Western District of Missouri,
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was mailed to Francis Canny and Haveth E. Mau, attorneys for Cornelius G. Loose on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD, Clerk,
(Seal) Western District of Missouri,
By E. O'Keefe, D. C.

Filed in the United States District Court July 23, 1943.

[fol. 12] (Clerk's Certificate to Transcript.)

United States of America,—Sct.:

I, A. L. Arnold, Clerk of the United States District Court for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the Designation filed herein and made a part hereof, in the cause wherein the United States of America, ex rel, Benjamin P. Pink, and Benjamin P. Pink, in his own behalf, is Plain-

tiff and Baker-Lockwood Manufacturing Company, a corporation, et al., are Defendants, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 29th day of July, A. D. 1943.

Seal
U. S. Dist. Court
West Div.
West. Dist.
of Mo.

A. L. ARNOLD, Clerk,
U. S. District Court,
By H. C. Spaulding,
Deputy Clerk.

Filed Jul. 31, 1943. E. E. Koch, Clerk.

[fol. 13] (Order extending time to file Transcript of Record.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.

Wednesday, July 21, 1943.

United States of America, ex rel., Benjamin P. Pink and Benjamin P. Pink in his own behalf, Keith Theatre Bldg., Cincinnati, Ohio, Plaintiff,

vs.

Baker-Lockwood Manufacturing Company, a Corporation, North Kansas City, Missouri, W. L. Mellor, (first name unknown) c/o Baker-Lockwood Manufacturing Co., North Kansas City, Missouri, Dahne Winebrenner, c/o Baker-Lockwood Manufacturing Co., North Kansas City, Missouri, Cornelius G. Loose, address unknown, last known address Washington, D. C., Ben D. Christian, c/o Safway Steel Products Co., Milwaukee, Wisconsin, Defendants.

This matter comes before the Court on an application for extension of time for filing record on appeal, the United States being represented by Richard K. Phelps, Assistant United States Attorney, there being no representation for other parties but it being stated by Mr. Phelps that there is no opposition to the granting of said motion, and the Court being advised,

It is Ordered that the motion be granted and that appellant the United States be given until on or before August 2, 1943, to file its record on appeal in this cause.

July 21, 1943.

[fol. 14] (Order denying Motion to Stay Proceedings; Consolidating cases and setting cases for hearing at September Term, 1943.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.

Tuesday, July 27, 1943.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Lou Nathanson (Plaintiff in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Company, Inc., et al.) Baker-Lockwood Manufacturing Company, Inc., a corporation, et al., Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Baker-Lockwood Manufacturing Company, Inc., et al. Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Benjamin P. Pink, (Plaintiff in United States of America, ex rel Benjamin P. Pink, and Benjamin P. Pink in his own behalf vs. Baker-Lockwood Manufacturing Company, et al.) Baker-Lockwood Manufacturing Company, et al., Appellees.

[fol. 15] Mr. Joseph M. Friedman, Attorney, Department of Justice, and Mr. Richard K. Phelps, Assistant

United States Attorney, for United States of America, appellant.

Mr. J. Francis O'Sullivan, for appellee Lou Nathanson.

On motion of the United States of America to stay further proceedings pending appeal.

The motion of the United States of America to stay all further proceedings in the District Court during the pendency of the appeals taken in each of the three above-entitled cases, appearing on the docket of the District Court as Civil Actions Numbers 1407, 1408 and 1411, is denied.

On the Court's own motion, the appeals in the three cases are consolidated for hearing and are hereby set for hearing before Division No. 1 of the Court at the session at St. Paul, Minnesota, on Wednesday, September 8, 1943. The parties are given leave to file consolidated briefs, if they so desire, the printed record and printed brief of the appellant to be served and filed on or before August 16, 1943, with the regular number of copies, and printed brief of appellees to be served and filed on or before September 2, 1943, with the regular number of copies, and reply brief of appellant to be served and filed on or before September 8, 1943, the reply brief being permitted to be in typewritten form and four copies thereof to be filed.

July 27, 1943.

[fol. 1] And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant in Cause No. 12,673.)

United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 12,673. vs.
Baker-Lockwood Manufacturing Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

FRANCIS M. SHEA,
Assistant Attorney General.

JOSEPH M. FRIEDMAN,
Attorney, Dept. of Justice
(Claims)

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 11, 1943.

(Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in Cause No. 12,673.)

The Clerk will enter my appearance as Counsel for the Appellees, Baker-Lockwood Mfg. Co., Inc., and W. L. Mellor.

M. J. HENDERSON, JR.
BEN W. SWOFFORD,
HERBERT JACOB,
531 Scarritt Bldg.,
Kansas City, Mo.
Attys. for Baker-Lockwood Mfg. Inc., a corp. and W. L. Mellor.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1943.

[fol. 2] (Appearance of Mr. J. Francis O'Sullivan as Counsel for Appellee, Lou Nathanson, in Cause No. 12,673.)

The Clerk will enter my appearance as Counsel for the Appellee, Lou Nathanson.

J. FRANCIS O'SULLIVAN,
Attorney for Appellee Lou Nathanson.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sept. 8, 1943.

(Appearance of Counsel for Appellant in Cause No. 12,674.)

United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 12,674. vs.
Baker-Lockwood Manufacturing Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

FRANCIS M. SHEA,
Assistant Attorney General.
JOSEPH M. FRIEDMAN,
Attorney, Dept. of Justice
(Claims)

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 11, 1943.

[fol. 3] (Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in Cause No. 12,674.)

The Clerk will enter my appearance as Counsel for the Appellees, Baker-Lockwood Mfg. Co., Inc., and W. L. Mellor.

M. J. HENDERSON, JR.
BEN W. SWOFFORD,
HERBERT JACOB,
531 Scarritt Bldg.,
Kansas City, Mo.
Attys. for Baker-Lockwood Mfg. Co., Inc., a corp., and W. L. Mellor.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1943.

(Appearance of Counsel for Appellant in Cause No. 12,675.)

United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 12,675. vs.
Baker-Lockwood Manufacturing Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

FRANCIS M. SHEA,
Assistant Attorney General.

JOSEPH M. FRIEDMAN,
Attorney, Dept. of Justice
(Claims)

[fol. 4] (Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 11, 1943.

(Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in Cause No. 12,675.)

The Clerk will enter my appearance as Counsel for the Appellees, Baker-Lockwood Mfg. Co., Inc., and W. L. Mellor.

M. J. HENDERSON, JR.
BEN W. SWOFFORD,
HERBERT JACOB,
531 Scarritt Bldg.,
Kansas City, Mo.
Attys. for Baker-Lockwood Mfg. Co., Inc., a corp., and W. L. Mellor.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1943.

(Motion of Appellee Nathanson to dismiss appeal, in Cause No. 12,673.)

In the United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 12,673. vs.
Lou Nathanson (Plaintiff in United States of America at the Relation of and to the Use of Lou Nathanson vs. Baker-Lockwood Manufacturing Company, Inc., et al.), Baker-Lockwood Manufacturing Company, Inc., a corporation, et al., Appellees.

[fol. 5] Appellee Nathanson moves to dismiss the appeal of the United States of America (not a party to the cause below) from the order denying its application to stay proceedings pending trial of a related criminal case upon the docket of the court below, because:

I.

The appellate jurisdiction of this court is wholly statutory and it can not legally review decisions of District Courts which are not final, under Section 128 of the Judicial Code (28 U. S. C. Sec. 225), other than proceedings for injunction, receivership and in admiralty, under Section 129 of the Judicial Code (28 U. S. C. Section 227).

II.

The denial of the Government's motion to stay the trial of this cause pending the trial of the related criminal case was not a final order, nor one granting or refusing an injunction. It was a mere administrative interlocutory order determining the order of trials of cases before the court below. (Neither the Government nor the defendants appealed or even attempted to appeal in the Nathanson case from the ruling denying defendants' motions to stay, so that the question of Nathanson's right to the cause of action under the Informers' Statute is in no way involved in this appeal.)

III.

The Government was not a party to the case below and had no right to file or to attempt to file any motion therein,

or to attempt to stay proceedings in the suit between plaintiff and defendants.

IV.

The Government's motion to stay (N.R.8-10) alleged [fol. 6] no grounds for the relief prayed.

V.

The record (N. R. 8-10) discloses an absolute violation of the Rules of Civil Procedure by appellant, in that no party to the case below was served any copy of the motion to stay, and of the Rules of the District Court (promulgated under Rules 83 and 78, Rules of Civil Procedure), requiring the service and filing of a memorandum brief and citation of the authorities relied upon to be filed with said motion.

VI.

The appeal was not taken in good faith, but solely because the Department of Justice seeks delay in the hope of procuring the passage of House Resolution 1203. That legislation was introduced at the request of the Attorney-General and his Department has strenuously and insistently urged its passage. The Bill, as pending on the Senate Calendar, attempts to place in the hands of the Attorney-General the right and election to abolish all such causes of action not in judgment upon the day of its passage. This is patently demonstrated by (1) a photostatic copy of the Bill as originally introduced and as it passed the House; (2) a Photostatic copy of the Attorney-General's letter to the Speaker of the House, requesting and demanding the legislation, which letter is contained in the Committee Report; (3) a photostatic copy of the Bill as amended and now pending on the Senate Calendar; (4) a photostatic copy of the Congressional Record of July 8th, 1943, and particularly pages 7515 to 7521 inclusive, of the proceedings of the Senate on said date; (5) excerpts from the oral opinion of Judge Otis of July 12th, [fol. 7] 1943, (N. R. 13-14), in passing upon the application to continue the criminal case, No. 16,529, United States of America vs. Baker-Lockwood, et al., and determining the matter of the date of the setting of Nathanson's civil action, No. 1407 below, which opinion was transcribed by the reporter and ordered filed in both the criminal case

and the Nathanson case below; (6) a photostatic copy of telegrams sent by counsel for plaintiff below to the Attorney-General and to the Secretary of War, dated July 12th, 1943; (7) a photostatic copy of letter addressed to the Attorney-General by counsel for plaintiff below, dated July 16th, 1943; (8) a photostatic copy of letter from the War Department, dated July 19th, 1943; and (9) a photostatic copy of letter from the Assistant Attorney-General Shea, for the Attorney-General, dated July 20th, 1943; all of which instruments and documents are herewith filed in support of Appellee Nathanson's motion to dismiss appeal.

J. FRANCIS O'SULLIVAN,
MAURICE J. O'SULLIVAN,
700 Gloyd Building,
Kansas City, Missouri.
Attorneys for Appellee Nathanson.

Memorandum of Clerk of Circuit Court of Appeals:

The instruments and documents referred to in the foregoing motion to dismiss are omitted at this place, pursuant to praecipe for record for Supreme Court filed by counsel for Appellee Nathanson.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 26, 1943.

[fol. 8] Memorandum of Clerk of Circuit Court of Appeals:

The three letters set out in the Appendix to the Government's memorandum filed September 13, 1943, in opposition to Motion of Appellee Nathanson to dismiss appeal, called for in praecipe for record for Supreme Court filed by counsel for Appellee Nathanson, are as follows, viz.:

July 21, 1943.

Honorable Merrill E. Otis,
United States District Judge,
Kansas City, Missouri.

My Dear Judge Otis: It was a pleasure to cooperate with you in your request of June 29, 1943, concerning the crim-

inal case of U. S. vs. Baker-Lockwood Manufacturing Co., et al. I regret exceedingly that circumstances beyond my control made it impossible to arrange for the appearance of one of the witnesses. Assistant Attorney General Tom C. Clark has discussed with me your order of July 12, 1943, continuing the case on the defendants' motion and I can understand that the conditions with which you were confronted precluded any other action except to grant some postponement.

A serious problem is created, however, by the circumstance that the civil suit against these defendants relating to the same offense is now set for trial on a date which precedes the trial date of the criminal case. I have recently received two communications from J. Francis O'Sullivan, Esq., attorney for the plaintiff in the civil suit, and I enclose a copy of his letter of July 16, 1943, for your information.

The civil suit, as you are undoubtedly aware, is not under my control. The statute which gives the right of suit to an informer, in the name of the United States, does not provide for governmental control of that litigation.

[fol. 9] Your familiarity with criminal fraud cases is well known to me, and I am sure you can readily appreciate the prejudice that might be caused to a criminal case by a full disclosure of the Government's evidence in a civil case prosecuted by advocates not selected by the Government or charged primarily with the problem of the Government's rights and interest.

The Senate is presently considering House Resolution No. 1203 which provides for the repeal of the statute under which the civil suit was filed. This bill has been passed by the House and has been recommended by the Senate Committee. If it becomes law at an early date, which now seems likely, it would appear that the right to maintain the civil suit would be withdrawn from the plaintiff Nathanson.

The Federal Bureau of Investigation has conducted the investigation of the facts of this case and it has long been the Department's policy that the results of such investigations are confidential and not available even to Congressional Committees. Under the circumstances you can

readily appreciate that I could not turn over the results of this investigation to Mr. O'Sullivan.

I will appreciate it if you will give consideration to all the facts involved and advise me of your opinion as to whether the ends of justice cannot best be served by a postponement of the civil suit and a stay of the taking of the proposed depositions until after the criminal action has been tried.

Sincerely yours,

s/ FRANCIS BIDDLE,
Attorney General.

Enc. #349862

[fol. 10] Merrill E. Otis,
District Judge.

United States District Court, Western District of Missouri,
Kansas City.

July 29, 1943.

Honorable Francis Biddle,
Attorney General of the United States,
Department of Justice, Washington, D. C.

My Dear Mr. Attorney General: A few days' absence from Kansas City on official business has delayed an acknowledgment of and reply to your letter of July 21, 1943, concerning the case of Nathanson vs. Baker-Lockwood Manufacturing Company, et al., and the companion criminal case of United States v. Baker-Lockwood Manufacturing Company, et al. I was further delayed by the necessity of consulting with counsel in those cases before I could reply to your letter. I just have finished a conference with them.

In your letter you express your reasons for believing that the trial of the case of Nathanson vs. Baker-Lockwood an informer suit) should be delayed until after the trial of the case of United States vs. Baker-Lockwood (a criminal case charging the same facts as are charged in the informer suit).

I agree that the criminal case should be tried first. Whether that now can be done in fairness (you are the last man who would think of asking me to do it otherwise)

is a real problem. I read your letter in the conference just held. I said to counsel that I would like very much to comply with your request. I said also, however, that I must be guided in the matter by principles that are applicable generally unless counsel would stipulate that the civil case might be delayed until after the trial of the criminal case. Counsel for Nathanson, Mr. Francis O'Sullivan, was not willing to enter into such an agreement except upon a condition which I shall state hereafter.

Several months ago I announced that the criminal case would be tried in advance of the civil case, provided the [fol. 11] criminal case was tried when it was set, unless any delay in the criminal case was not chargeable to the United States. The case was set twice, once for June 21 and then for July 12. It was continued twice. The United States was clearly responsible for both continuances. The first continuance was necessary because of the fact that the United States brought in a new indictment against the defendants just a few days before June 21. The second continuance was made necessary because the United States (not the Department of Justice) made impossible the attendance of certain of defendants' witnesses who, on the allegations set out in the application for a continuance, were essential witnesses. The United States Attorney did not feel that he could agree that the witnesses, if present, would testify in accordance with the statements set out in the applications for a continuance. Probably the United States Attorney should not have agreed that they would so testify, but I am not certain that his case would have been jeopardized by that agreement. He did not make the agreement because he did not believe the witnesses would testify as it was said they would. At any rate, it was the action of the United States, the plaintiff in the case, which prevented the trial.

Since I repeatedly had announced in open court, in the presence of all of the parties, that the civil case would be tried when reached in due course if the criminal case had been delayed through the fault of the United States, you must agree with me that I must keep faith with the parties and give the plaintiff in the civil case an opportunity at least to prove his case. It does not seem to me that as the time set for trial draws near he will be so anxious to

proceed as he is now. That, however, is not a matter with which it is my duty to concern myself.

I have said that counsel for Nathanson in open court agreed this morning that he would stipulate that the civil case should be tried after the criminal case on a condition which he stated. It is his contention, and your letter to me confirms it, that it is the hope of the government that the pending legislation directed against suits of this character will make it impossible for the plaintiff ever to get a trial. It seems that the pending bill contains a provision for the filing of a motion by the Attorney General to [fol. 12] stay any civil case of the character here involved. Counsel for Nathanson agrees to enter into the stipulation I have referred to if the Attorney General will stipulate that in this particular case he will not file such a motion. I do not apprehend at all that you will agree not to file such a motion, but it does seem to me that counsel's proposal is not entirely unfair. Probably counsel ought not to be expected to enter into a stipulation that he will hang himself on a not too distant date.

I have written more fully than probably is justified, but I have done that out of my great respect for you and my most earnest desire in every proper way to cooperate with you.

Respectfully yours,

s/ MERRILL E. OTIS.

J. Francis O'Sullivan
Attorney at Law
700 Gloyd Building
921 Walnut Street
Kansas City, Missouri.

July 30, 1943.

Re United States ex rel Lou Nathanson vs. Baker-Lockwood Manufacturing Co., et al., Civil Action 1407.

Hon. Francis G. Biddle,
Attorney General of the United States,
Washington, D. C.

Dear Sir: Receipt is acknowledged of yours of July 20th, which reached me on Friday last. Before I had an op-

portunity to answer you, I was advised on Saturday that Mr. Joseph Friedman, one of your *assistants, would arrive* late on Monday and present motion to stay all proceedings to the Circuit Court of Appeals on Tuesday morning at ten o'clock. I was served with copy of his motion, affidavit and memorandum at five-twenty o'clock p. m. on Monday. It was argued at length on Tuesday and denied.

Thereafter, he and your Mr. Morgan conferred with me in the District Attorney's office. They asked if there were any circumstances under which I would request the [fol. 13] continuance of the civil suit until after the trial of the criminal case. I advised them that because of the pending H. R. 1203 on the Senate Calendar, I could not accede to your wishes or those expressed by Messrs. Shea and Friedman, that I request the trial of the civil case be reset after the criminal case, unless, all things considered, you personally would enter into a stipulation in consideration of such a request on my part that you would file no motion in the civil case to dismiss same, such as is contemplated in the pending legislation, and we could be assured that our case would not in any way be affected by any such legislation.

Your Mr. Friedman told me that he would advise you, Messrs. Clark and Shea of the conversations had, and that he would thereafter call or wire me with respect to the proposal.

I was quite shocked when Judge Otis, at a conference on yesterday, disclosed the receipt of your letter of July 21st, 1943, to him and read its contents to us. I thereafter, and in the presence of representatives of your Department, told Judge Otis of my conversation of Tuesday last with Messrs. Friedman and Morgan, and of the answer I made to them with respect to their suggested continuance of the civil case.

I am aware of the contents of Judge Otis' reply to your letter. I concur in his belief that you should not request my client and myself to willingly delay the trial of the civil case until you can arrange its demise at an early date.

Very truly yours,

JFO'S:T s/ J. FRANCIS O'SULLIVAN.

[fol. 14] (Order of Submission in Causes Nos. 12,673, 12,674 and 12,675.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1943.

Wednesday, September 8, 1943.

Appeal from the District Court of the United States for the Western District of Missouri.

United States of America, Appellant,
No. 12,673. vs.
Baker-Lockwood Manufacturing Company, Inc., et al.

Appeal from the District Court of the United States for the Western District of Missouri.

United States of America, Appellant,
No. 12,674. vs.
Baker-Lockwood Manufacturing Company, Inc., et al.

Appeal from the District Court of the United States for the Western District of Missouri.

United States of America, Appellant,
No. 12,675. vs.
Baker-Lockwood Manufacturing Company, Inc., et al.

These causes having been called for hearing in their regular order, argument was commenced by Mr. Joseph M. Friedman, Chief, War Frauds Civil Unit, Department of Justice, for the appellant, continued by Mr. J. Francis O'Sullivan for appellee Lou Nathanson in Cause No. 12,673 and for appellees generally, and concluded by Mr. Joseph M. Friedman for the appellant.

Thereupon, these causes were submitted on the records [fol. 15] from said District Court, briefs of counsel for the respective parties, and on the motion of appellee Lou Nathanson to dismiss the appeal in Cause No. 12,673 with brief in support and memorandum in opposition.

[fol. 16] (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 12,673.

United States of America, Appellant,

vs.

Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor and Dahne W. Winebrenner (alias Murray Bailey) and Cornelius G. Loose and Ben D. Christian and Lou Nathanson (Plaintiff, in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Co., Inc., et al.), Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

No. 12,674.

United States of America, Appellant,

vs.

Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian, Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

No. 12,675.

United States of America, Appellant,

vs.

Baker-Lockwood Manufacturing Company, a Corporation, W. L. Mellor (first name unknown), Dahne Winebrenner, Cornelius G. Loose, and Ben D. Christian, and Benjamin P. Pink (Plaintiff, in United States of America, ex rel. Benjamin P. Pink, et al., vs. Baker-Lockwood Manufacturing Company, a corporation, et al.), Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

[September 29, 1943.]

Mr. Joseph M. Friedman, Chief, War Frauds Civil Unit, Department of Justice (Mr. Francis M. Shea, Assistant Attorney General, and Mr. Samuel D. Slade, Mr. Bonnell Phillips, and Mr. Jess G. Shiffmann, Attorneys for the United States, were with him on the brief) for appellant.

Mr. J. Francis O'Sullivan (Mr. Maurice J. O'Sullivan was with him on the brief) for appellee Lou Nathanson.

Mr. M. J. Henderson, Jr., Mr. Ben W. Swofford, Mr. Herbert Jacob, and Mr. John B. Pew filed brief for appellees, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor.

Before Sanborn and Riddick, Circuit Judges, and Lemley, District Judge.

Riddick, Circuit Judge, delivered the opinion of the Court.

On February 12, 1943, the United States grand jury at Kansas City, Missouri, in the Western District of Missouri, returned an indictment charging the Baker-Lockwood Manufacturing Company, Inc., and certain individuals with having entered into a conspiracy to defraud the United States in violation of section 37 of the Criminal Code, 18 U.S.C.A. § 88. On Saturday, February 13, 1943, the day following the return of the indictment, one Nathanson, a resident of Chicago, filed a civil action against the parties charged in the indictment for the recovery of penalties and double damages provided by section 5438, 18 U.S.C.A. §§ 80, 82-86, and sections 3490-3493, 31 U.S.C. §§ 231-243, 31 U.S.C.A. §§ 231-234, of the Revised Statutes, hereinafter sometimes referred to as the false claims statute. The style of this action in the district court was United States of America at the relation of and to the use of Lou Nathanson, Plaintiff, v. Baker-Lockwood Manu-

facturing Company, Inc., et al., Defendants. On the following Monday, February 15, 1943, the United States, proceeding under the same statute against the same parties and for the same relief, filed its civil action under the style of United States of America, Plaintiff, v. Baker-Lockwood Manufacturing Company, Inc., et al., Defendants. And on February 17, 1943 one Pink, a resident of Cincinnati, Ohio, instituted the identical cause of action in the federal district court at Kansas City under the style of United States of America on relation of Benjamin P. Pink, Plaintiff, v. Baker-Lockwood Manufacturing Company, et al., Defendants.

We are concerned here only with the civil proceedings mentioned above. Section 5438 of the Revised Statutes makes punishable by fine and imprisonment certain efforts to defraud the Government of the United States. By sections 3490 to 3493 of the Revised Statutes, it is provided that one committing any of the acts prohibited by section 5438 shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of the damages sustained by the United States, together with costs of the suit, to be recovered in one civil action. The statute commands the district attorneys of the United States to be diligent in the discovery of false claims against the United States and in the prosecution of civil actions to recover the forfeitures and damages provided by the statute. The Act further provides that such suits may be brought and carried on "by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent"; and that a private person bringing the authorized suit and prosecuting it to final judgment shall be entitled

to receive one-half of the amount of the forfeiture and of the damages recovered in the action.

The Baker-Lockwood Manufacturing Company, Inc., filed in each civil action a motion to stay proceedings, alleging that each of the actions involved the same parties plaintiff and defendant, and the same facts and circumstances, and that the defendants could be compelled to respond in only one of them. The United States also in each of the civil actions filed a motion to stay proceedings until the trial of the criminal action, alleging that only one cause of action existed for the recovery of the penalties and damages provided in such cases, and that only one of the civil actions could be tried. All of the motions for stays of the civil actions were submitted to the district court at the same time, and argument thereon was participated in by counsel representing all of the parties. It clearly appears from the record that all parties were agreed that the three civil actions involved the identical cause of action against the defendants and that only one of them could be tried; and further that, at the hearing upon the motions, the sole issue as between the parties to the civil actions was which action was entitled to preference over the other in the order of trial, and that this was the issue decided by the court.

At the conclusion of the hearing on the motions, the district court denied the motion of the Government to stay proceedings in the three civil actions until the trial of the criminal action. No reason was given for this decision, but it is inferable from the record that at the time it was rendered the criminal case had been set for trial ahead of the civil actions. Later it developed that the Government was unable to proceed with the trial of the criminal action because of the absence of necessary witnesses, and it became necessary to postpone its trial. In the meantime, however, the district court, having taken the motions for stays in the civil actions under advisement,

entered in each action an identical order, by which it stayed the trial of the Government's civil action and of Pink's case until further order of the court. The Nathanson suit was set for trial, and, as matters now stand, it will be tried in advance of the Government's criminal action, and before the Government's civil action. The district court was of the opinion that as between the three civil actions the one first filed in the court was entitled to take precedence over the others. The Government has appealed from the order of the district court overruling its motion to stay proceedings in the civil cases until the trial of the criminal case, and from the orders of the district court staying proceedings in the Government's civil action. The appeals have been heretofore consolidated for hearing in this court.

Nathanson has moved to dismiss the appeal of the United States in the Nathanson suit on several grounds, only three of which require notice. He contends (1) that the United States is not a party to the Nathanson suit, and, for that reason, is not entitled to appear in it or appeal from an order made in it; (2) that the Government has not in fact perfected an appeal from the order staying the Government's civil action entered in the Nathanson suit; and (3) that the order of the court staying the Government's suit is a mere procedural order from which no appeal lies. All of these contentions must be denied. The United States is not only a party on the record in the Nathanson suit, it is a real party in interest, and, as such, we think it has the right to appear and be heard in the protection of its interests. Nor is the question whether the Government has perfected an appeal from the stay order entered in the Nathanson suit of any practical importance in decision here. We think the appeal was properly taken. But, in any event, the Government has appealed from the stay order entered in its civil action, and that order, being identical with the stay order entered in the Nathanson

suit and in the Fink suit, made at the same hearing upon the same motion in all three suits, it is unimportant, if true, that the Government has not appealed from one or the other of the record entries of the same order. In the circumstances here an appeal from one, in ultimate result, is an appeal from all. A reversal of the stay order entered in the Government's suit with directions to grant it precedence over the informer's suit disposes of Nathanson's claim to precedence.

We think the order staying the prosecution of the Government's civil action and granting precedence to the trial of Nathanson's action is clearly injunctive in nature, and, as such, appealable under section 129 of the Judicial Code, 28 U.S.C.A. § 227. *Ettelson et al.*, v. *Metropolitan Life Insurance Company*, 317 U.S. 108; *Griesa* v. *Mutual Life Insurance Company*, 8 Cir., 165 Fed. 48. The order was more than a mere administrative, interlocutory order determining the order of the trial of cases before the court below. The effect of the stay order was not merely to determine the order of trial of different actions pending in the district court, but to put an end to the actions, including the Government's action, which were stayed. The court was not dealing with three separate and distinct causes of action, but with one cause of action which had become the subject matter involved in three separate suits. In these circumstances, the trial of one of the cases and the staying of the others effectively disposed of the suits which were stayed. The finality of the order and its injunctive character are sufficiently illustrated by Nathanson's contention that as the first plaintiff to file he is entitled to the exclusive possession and control of the cause of action involved in the three suits, and to priority in trial, as well as by the agreement of all of the parties that the trial of one of the suits would put an end to the others.

This brings us to the merits of the controversy before us. It should be pointed out that we are not concerned with the question of the right of precedence in the order of trial as between mere *qui tam* plaintiffs in different suits on the same cause of action under the false claims statute. That question is not before us and is not decided. Nor is there involved in this proceeding any question of the right of the private informer to proceed in a civil action under the false claims statute, where the Government has neither brought the same action nor indicated an intention to bring it. The precise question here is whether a *qui tam* plaintiff is entitled to the exclusive control and prior trial of an action to recover for frauds perpetrated upon the United States, on the sole ground that the *qui tam* plaintiff was the first to file the proceeding in court, and without regard to the ability of the *qui tam* plaintiff adequately to represent the public interest, where it is conceded that the same cause of action is also being concurrently prosecuted with diligence by the United States through its duly constituted officials. In the decision of the question presented, the relative rights of the Government and of the *qui tam* plaintiff to share in the recovery sought against the defendants are of little or no significance. The public interest is paramount, and the question must be resolved by an interpretation of the false claims statute in the light of considerations of the orderly administration of justice and the effective enforcement of the laws of the land.

In the recent case of *United States ex rel. Marcus* v. *Hess, et al.*, 317 U.S. 537, 63 S. Ct. 379, the court sustained the right of a *qui tam* plaintiff proceeding under the false claims statute to maintain a cause of action to recover penalties and damages provided by the statute, where the Government had brought no civil action of its own, although the *qui tam* plaintiff in that case had contributed nothing to the discovery of the fraud, but had based his

civil action upon information obtained from the Government's successful criminal prosecution. The decision of the court was based upon the interpretation of the false claims statute as related to the facts of that case. The question here was not involved in the proceeding and was not decided (63 S. Ct. 386). In the course of its opinion the court said: "Furthermore, one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds. To that end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits." We think the statement quoted expresses the only possible interpretation of the Act as applied to the circumstances before us in this case. Congress intended by the Act to ensure vigorous prosecution of suits to recover damages for frauds perpetrated against the Government, and to guard against the possibility of laxity or worse on the part of enforcement officers of the Government, it offered large rewards for the prosecution of such suits on behalf of the Government, where its own officers failed to act with the diligence which the discharge of their official duties required of them. So interpreted, few will question the wisdom of the Act, even though changing circumstances may have made the reward offered the private prosecutor inordinately large. But it is quite another thing to ascribe to Congress the intent to authorize the private informer, at great expense to the public treasury, to usurp the duties of Government prosecuting officers or to proceed with the exclusive prosecution of suits for recovery under the Act when the Government itself through its duly designated officials is proceeding with diligence and dispatch to the same end. The threat to the orderly administration of justice resulting from giving the false claims statute such an interpretation is too obvious to require discussion. To

hold that the Government, after the careful and diligent investigation and preparation necessary to the prosecution of an action in the Government's interest and on its behalf, must stand aside and stay its law-enforcement arm merely because a private citizen, having knowledge of the frauds involved, has won the race to the courthouse is to subjugate the public interest in the orderly administration of justice to the private interest of a citizen in the recovery for himself of the reward offered by the statute.

We find nothing in the wording of the Act of Congress involved here to justify a contrary interpretation. Indeed, the Act contains an expressed recognition of the paramount public interest in suits brought by informers in the provision requiring the consent of the judge and the district attorney to an abatement of the action. Likewise, the provision in the Act that the informer should be liable for all costs incurred in the prosecution of an informer's suit indicates the intention of Congress that informer suits were only authorized when the Government itself does not proceed in the same cause of action. Moreover, we think the justifiable inference from the language of the court in *United States ex rel. Marcus* v. *Hess, et al.*, quoted above, and from the decision of the court in the earlier case of *Francis* v. *United States*, 5 Wall. 338, 18 L. Ed. 603, supports the conclusion which we have reached. In the case last mentioned the right of an informer under a similar statute to project himself into a suit already brought by the Government was denied. The question for decision here can not be made to turn upon the fortuitous circumstance that the Government or the *qui tam* plaintiff was the first to file a pleading in the court. Diligence on the part of governmental enforcement officers in the administration of justice and in the enforcement of the laws of the land for the protection of the public interest may not be made to depend, to use the words of the trial court, upon the outcome of "the miserable race" to the

courthouse. Diligence in the enforcement of the false claims statute requires of the Department of Justice the careful and orderly investigation and preparation of the action to be brought, in order that the Government may be able, when the suit is filed, to prosecute it with fairness to the defendants charged as well as to the public. We hold that in the circumstances disclosed by the record before us the United States is entitled to precedence in the trial of the civil action over those actions brought by the informers, Nathanson and Pink.

The Government does press its appeal from the order of the district court declining to stay proceedings in the civil action pending the trial of the criminal prosecution. As noted above, the record does not disclose clearly the basis of the court's action on that motion. In ordinary circumstances, such a motion is addressed to the discretion of the trial court, and this, we assume, was the situation here. It is proper to point out, however, that on the reversal of the stay orders involved in these appeals, the district court will have before it both the criminal and the civil actions brought by the United States, with the right in the Government to try either action in advance of the civil actions brought by the informers. In these circumstances, the Government should be permitted to elect which of the actions, civil or criminal, it shall first proceed with, in the absence of any showing of prejudice to the defendants in the respective actions or of a want of diligence on the part of the Government in the prosecution of the suit with which it elects to proceed.

The order of the district court overruling the motion to stay the civil actions pending the trial of the criminal prosecution is affirmed. The orders of the district court staying the Government's civil action are reversed, and these cases are remanded to the district court with directions to stay proceedings in the Nathanson suit and in the Pink suit, and for further proceedings in accordance with this opinion.

[fol. 27] (Judgment in Causes Nos. 12,673, 12,674 and 12,675.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1943.

Wednesday, September 29, 1943.

United States of America, Appellant,
No. 12,673. vs.
Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor and Dahne W. Winebrenner (alias Murray Bailey) and Cornelius G. Loose and Ben D. Christian and Lou Nathanson (Plaintiff, in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Co., Inc., et al.)

United States of America, Appellant,
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United States of America, Appellant,
No. 12,675. vs.
Baker-Lockwood Manufacturing Company, a corporation, W. L. Mellor (first name unknown), Dahne Winebrenner, Cornelius G. Loose, and Ben D. Christian, and Benjamin P. Pink (Plaintiff, in United States of America, ex rel, Benjamin P. Pink, et al., vs. Baker-Lockwood Manufacturing Company, a corporation, et al.)

[fol. 28] Appeals from the District Court of the United States for the Western District of Missouri.

These causes came on to be heard on the motion of the appellee Lou Nathanson to dismiss the appeal No. 12,673 (No. 1407 in the District Court), and on the transcripts of the records from said District Court, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this Court that the said motion of Lou Nathanson to dismiss the appeal in No. 12,673 be, and it is hereby denied.

It is further ordered and adjudged by this Court that the order of said District Court overruling the motion to stay the civil actions pending the trial of the criminal prosecution be, and it is hereby, affirmed.

It is further ordered and adjudged by this Court that the orders of the said District Court staying the Government's civil action be, and they are hereby, reversed.

And it is further ordered by this Court that these causes be, and they are hereby, remanded to the said District Court with directions to stay proceedings in the Nathanson suit, No. 1407 in the District Court and in the Pink suit, No. 1411 in the District Court, and for further proceedings in accordance with the opinion of this Court this day filed herein.

September 29, 1943.

[fol. 29] (Separate Motion of Appellee Nathanson for Stay of Mandate in Causes Nos. 12,673, 12,674 and 12,675.)

Comes now Appellee Lou Nathanson, by J. Francis O'Sullivan, his attorney, and respectfully prays that an order be herein entered staying the issuance of the mandate herein until and including November 13th, 1943, and thereafter until final disposition of said cause by the Supreme Court of the United States, in the event that on or before said date there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the petition for writ of certiorari, record and brief have therein been filed, as provided by Rule 16 of this Court. In support of this motion Appellee shows to the Court:

1. That on September 29th, 1943, an opinion was filed in the above captioned causes and an order and judgment was entered in this court reversing and remanding said causes to the District Court of the United States for the Western Division of the Western District of Missouri, with directions to stay proceedings in the Nathanson suit and for further proceedings in accordance with said opinion and judgment.

2. That under Rule 16 of this Court, the mandate in said causes will issue at the expiration of fifteen days after the date of the opinion, judgment and order aforesaid.

3. The Appellee Nathanson intends in good faith to file in the Supreme Court of the United States a petition for writ of certiorari to this Court in these causes within the time allowed by law as provided by the statutes of the United States in such cases, and in accordance with the rules of the Supreme Court of the United States. [fol. 30] Wherefore, Appellee Nathanson prays the Court that the issuance of the mandate of this Court in the aforesaid three causes be stayed until and including November 13th, 1943, and thereafter until final disposition of said cause by the Supreme Court of the United States, as provided for and by Rule 16 of this Court.

J. FRANCIS O'SULLIVAN,
700 Gloyd Building,
Kansas City, Missouri,
Attorney for Appellee Lou Nathanson.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 14, 1943.

(Order denying Motion for Stay of Issuance of Mandate in Causes Nos. 12,673, 12,674 and 12,675.)

September Term, 1943.

Monday, October 25, 1943.

This matter comes before the Court upon the separate motion of appellee Lou Nathanson for an order staying the issuance of the mandate of this Court pending application for the writ of certiorari from the Supreme Court of the United States, upon such appellee's memorandum in support of the motion, upon the memorandum of the United States in opposition thereto and upon the oral presentation of the motion by Mr. J. Francis O'Sullivan, counsel for appellee Nathanson. The Court being advised,

It is Ordered that said motion for stay be and is hereby denied.

October 25, 1943.

[fol. 31] (Praecipe of Lou Nathanson for record for use in Supreme Court, U. S., in Causes Nos. 12,673, 12,674 and 12,675.)

The record on certiorari in the above captioned cases will include the following:

1. The printed records in Civil Cases 12,673, 12,674 and 12,675 in the Circuit Court of Appeals.

2. Appellee Nathanson's Motion to dismiss appeal, without the nine attached and accompanying exhibits.

3. The three letters set out upon pages 21-26 in the appendix following the Government's memorandum in opposition to motion of Appellee Nathanson to dismiss appeal.

4. The opinion filed September 29th, 1943, with the judgment and order of the Court of Appeals thereon.

5. Appellee Nathanson's motion to stay mandate filed October 13th, 1943, and the order denying same filed October 25th, 1943.

6. Any other minutes of any proceedings of this Court subsequent to the printing of the transcripts of the record in the aforesaid three appeals, together with this praecipe.

J. FRANCIS O'SULLIVAN,
MAURICE J. O'SULLIVAN,
Attorneys for Appellee Nathanson
700 Gloyd Building,
Kansas City, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 30, 1943.

[fol. 32] (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcripts of the records from the District Court of the United States for the Western District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for

the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with praecipe of counsel for Appellee Nathanson, in certain causes in said Circuit Court of Appeals wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, Inc., et al., were Appellees, No. 12,673, wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, Inc., et al., were Appellees, No. 12,674, and wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, a Corporation, et al., were Appellees, No. 12,675, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the 28th day of October, A. D. 1943, a mandate was issued out of said Circuit Court of Appeals in said causes, directed to the Judges of the [fol. 33] District Court of the United States for the Western District of Missouri.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 16th day of December, A. D. 1943.

(Seal)

E. E. KOCH,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.